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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SELTZER CAPLAN McMAHON VITEK, a Law Corporation, Defendant/Petitioner, vs. DAMON ABNOS, an individual, Plaintiff/Respondent.	CASE NO. 3:08-cv-00201-WQH-WMc **DEFENDANT/PETITIONER SELTZER CAPLAN McMAHON VITEK'S REPLY IN SUPPORT OF ITS MOTION TO REMAND TO STATE COURT** Judge: Hon. William Q. Hayes Courtroom: 4 (4th Floor) Date: April 25, 2008 Time: 1:30 p.m.

I. INTRODUCTION

Mr. Abnos' Opposition to SCMV's Motion to Remand is less noteworthy for what it says, than for what it fails to say. In his 20-page brief Mr. Abnos fails to cite, analyze, or even mention the primary California statutes on which SCMV's motion is based. That is not surprising. Ignoring those statutes is necessary for Mr. Abnos to attempt to convince this Court that it has jurisdiction.

In addition to ignoring the controlling statutes, Mr. Abnos appears to try to side-step the central legal rule asserted by SCMV's Motion: that once an action is stayed pending binding arbitration, a subsequent dismissal—voluntary or otherwise—has no effect on the court's vestigial jurisdiction to confirm an arbitration award in the pending action at law. Mr. Abnos' reliance on cases describing the effect of a dismissal outside that narrow context misses the mark.

By failing to squarely address the rule that a later dismissal of claims that have already been ordered to binding arbitration is *functus officio*—without any legal effect—and failing to address the jurisdiction and venue statutes that are part and parcel of California's arbitration scheme, Mr. Abnos effectively concedes that he is indeed a plaintiff in a pending action and therefore cannot remove that action to federal court.

At the end of the day, Mr. Abnos has failed to meet his burden to prove he is a "defendant" for purposes of the removal statute, 28 U.S.C. section 1441(a). In this Circuit, any doubt must be resolved *against* removal.

Accordingly, the Court should remand this action to state court and order Mr. Abnos to pay the costs and fees SCMV incurred in response to Mr. Abnos' improper removal.

II. ARGUMENT

A. MR. ABNOS DOES NOT DISPUTE THAT THE LEGAL STANDARD IN DECIDING THIS MOTION IS HEAVILY WEIGHTED IN FAVOR OF REMAND, OR THE CRUCIAL UNDERLYING FACTS.

At the outset, it is important to note that Mr. Abnos does not dispute that it is his burden to prove that this court has jurisdiction.[1] Nor does he dispute that in this Circuit, there is a "strong presumption" *against* removal jurisdiction and the Court should reject such jurisdiction "if there is any doubt as to the right of removal in the first instance."[2]

Also, Mr. Abnos does not dispute that he, by his own voluntary act, chose to file his lawsuit—San Diego Superior Court Case Number GIC 864098—in California state court as Plaintiff on April 10, 2006.[3] He does not dispute that in that action, SCMV filed a Motion to Compel Arbitration on September 29, 2006, and that afterward, on November 16, 2006, the Court stayed the action and ordered binding arbitration of all claims and cross-claims.[4] Mr. Abnos also does not dispute that when the parties dismissed their claims, those claims had already been relegated to arbitration.[5]

Given the legal standard and those undisputed facts, in the context of this case it is Mr. Abnos' burden to prove—as a matter of law—that a later dismissal of the claims already submitted to binding arbitration by the court destroys the court's vestigial jurisdiction to confirm or vacate the eventual arbitration award. Mr. Abnos has not met that burden.

B. MR. ABNOS' OPPOSITION IGNORES THE CALIFORNIA ARBITRATION STATUTES AND MISAPPLIES THE RELEVANT CASE LAW.

In his Opposition, Mr. Abnos completely ignores the pertinent sections of California's statutory arbitration scheme that compel remand in this case. As demonstrated in SCMV's

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[1] *See, generally*, Mr. Abnos' Opposition; *Gaus v. Miles, Inc.* (9th Cir. 1992) 980 F.2d 564, 566; *B., Inc. v. Miller Brewing Co.* (5th Cir. 1981) 663 F.2d 545, 549; *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter* (C.D. CA 2002) 199 F.Supp.2d 993, 1000 (citing text).

[2] *See, generally*, Mr. Abnos' Opposition; *Gaus v. Miles, Inc.*, *supra*, 980 F.2d at 566.

[3] *See, generally*, Mr. Abnos' Opposition.

[4] *See id.*

[5] *See id.*

Motion, "After a petition [to compel arbitration] has been filed under [Title 9 of the Code of Civil Procedure], the court in which such petition was filed retains jurisdiction to determine *any subsequent petition* involving the same agreement to arbitrate and the same controversy, and *any such subsequent petition* shall be filed in the same proceeding."[6] Thus, a trial court has jurisdiction to grant a petition to compel arbitration under Code of Civil Procedure section 1281.2, which by virtue of Title 9's venue statute (section 1292.4) must be filed in the action at law. Likewise, it has jurisdiction to stay the action at law (again, by virtue of the venue statute (section 1292.8)). *Either* of these actions vests the trial court with jurisdiction under section 1292.6 over any subsequent petition relating to the arbitration proceedings.[7]

Mr. Abnos' Opposition is utterly silent on these statutory provisions. Nowhere does he argue they do not apply, and nowhere does he attempt to explain how a later dismissal of the claims being arbitrated somehow divests the court of its statutory jurisdiction to hear a subsequent petition involving the same agreement to arbitrate and the same controversy.[8] Moreover, if accepted, Mr. Abnos' argument would effectively eviscerate the above statutes.

Just as importantly, Mr. Abnos fails to rebut the rule that once a court orders binding arbitration of claims before it, absent an agreement to withdraw the controversy from arbitration, no judicial act is authorized.[9] As the California Court of Appeals put it, "This vestigial jurisdiction over the action at law consists solely of making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits."[10]

It is here too that Mr. Abnos misses the mark. SCMV is not arguing that, in general, dismissal has no effect. Rather, as demonstrated in SCMV's Motion, in the specific context of this case, the court had no authority—after the claims were ordered to arbitration—to do anything other than confirm or vacate the arbitration award. Thus, the dismissal on which Mr. Abnos bases his entire argument did not deprive the court of its jurisdiction to confirm the arbitration award, because: 1) by statute, the court automatically retained jurisdiction to do so; and 2) the dismissal had no legal effect.[11] As the California Court of Appeal explained:

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[6] Code of Civil procedure § 1292.6 [emphasis added].

[7] *Brock, supra*, 10 Cal.App.4th at 1804.

[8] *See, generally*, Opposition.

[9] *Byerly v. Sale* (1988) 204 Cal.App.3d 1312, 1315.

[10] *Brock, supra,* 10 Cal.App.4th at 1796.

> The superior court dismissal did not terminate the legal vitality of this action. When the agreement for binding arbitration was reached, the pleadings in the civil action, having fulfilled their purpose, became virtually *functus officio*. Despite the dismissal, the arbitration agreement could be independently enforced within the period of the statute of limitations on petition to the superior court; and ***any resulting award could be confirmed in the same manner, without reference to the complaint or cross-complaint.***[12]

Thus, the *Dodd* Court concluded, "dismissal, even if appropriate, merely reduced the court's involvement to hearing motions to compel arbitration and ***enforce any award***."[13]

That is all SCMV's Petition asked the state court to do: enforce the arbitration award. Contrary to Mr. Abnos' argument in his Opposition, *Dodd* and its progeny do *not* just stand for the proposition that the "fate of an action at law has no direct effect on the contractual arbitration proceedings."[14] Rather, as explicitly stated by the *Dodd* Court itself, above, those cases also hold that *any resulting arbitration award can be confirmed on petition to the superior court in the same action wherein the court ordered arbitration, even after dismissal.* Succinctly, "dismissal…merely reduced the court's involvement to hearing motions to compel arbitration and ***enforce any award***."[15]

Mr. Abnos' attempt to distinguish the effect of a dismissal of some claims from a dismissal of the "entire action"[16] in this context is unavailing. As explained in SCMV's Motion, in *Byerly v. Sale*, Plaintiff Ann Byerly, bound by an arbitration agreement, nevertheless brought an action for medical malpractice. On the defendant's petition, the matter was sent to arbitration, and languished there until the statutory period ran for failure to "bring an action to trial." The defendant then moved to dismiss the entire action at law, which the trial court granted. But as the Court of Appeals explained, there was effectively nothing for the trial court to dismiss:

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[11] *Dodd v. Ford* (1984) 153 Cal.App.3d 426, 432.

[12] *Id*. [emphasis added].

[13] *Id*. [emphasis added].

[14] Mr. Abnos' Opposition, p. 9, ll. 1-3.

[15] *Id*. [emphasis added].

[16] Opposition, p. 10, ll. 7-14.

> The agreement [Plaintiff] signed rendered her civil action for medical malpractice superfluous in the first place: She could have avoided that step and proceeded directly to arbitration. But Byerly did initiate a lawsuit, and it was necessary for the court to formally relegate it to the arbitration system. At that point the complaint, "having fulfilled [its] purpose, became virtually *functus officio*." Barring a subsequent stipulation not to arbitrate, the judicial system's future involvement should have been limited merely to confirming, correcting, or vacating any arbitration award. In other words, the court no longer had any reason to entertain the motion to dismiss the complaint here.[17]

Thus, Mr. Abnos attempts to provide a distinction without a difference. Whether the dismissal was styled as to the complaint, the claims, or the entire action, the effect on the existence of a pending action wherein the court could later confirm the arbitration award was the same: it had none. Thus, while the pleadings no longer had any meaning, the shell of the action remained, whether that action was purportedly dismissed or not. It was into that shell, that pending action, that SCMV submitted its Petition to Confirm the Arbitration Award.

In addition, Mr. Abnos repeatedly argues that at the time of the voluntary dismissal of the claims, or afterward, SCMV never specifically made a request that the court retain jurisdiction to confirm the arbitration award.[18] But he fails to cite *any* authority that a party must make such a request. Moreover, any arbitrary requirement for a request that a court retain jurisdiction to confirm an arbitration award—after the court ordered the arbitration in the first instance—makes little sense because the court *automatically* retains such jurisdiction as a matter of law. "After a petition [to compel arbitration] has been filed under [Title 9 (Code of Civil Procedure sections 1280-1294.2)], the court in which such petition was filed retains jurisdiction to determine *any subsequent petition* involving the same agreement to arbitrate and the same controversy, and *any such subsequent petition* shall be filed in the same proceeding."[19] Not surprisingly, this is one of the statutes Mr. Abnos completely ignores in his Opposition.

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[17] *Byerly v. Sale* (1988) 204 Cal.App.3d 1312 at 1315 [citations omitted].

[18] *See* Opposition, p. 5, ll. 8-9, 19; p. 9, 16-18, 19-22.

Lastly, Mr. Abnos attempts to rely on the declaration of Erin Sunseri who purportedly spoke to an unnamed clerk in San Diego Superior Court. First, the declaration should be stricken or disregarded in its entirety because it is based on hearsay, and contains legal conclusions. Moreover, the declaration is misleading in that nowhere is there any foundation that the correct procedural posture of the case was explained to the unnamed clerk. It is also not relevant, because the court did accept SCMV's Petition *as filed* as part of a pending case.

Accordingly, based on Code of Civil Procedure section 1292.6 and others Mr. Abnos chooses to ignore, as well as based on a true reading of the relevant case law, the action at law Mr. Abnos started as plaintiff, Case Number GIC 864098, was still pending for purposes of confirming the arbitration award. Mr. Abnos is therefore not a "defendant" who may remove an action to federal court.

C. SCMV IS ENTITLED TO RECOVER ITS COSTS AND ATTORNEYS FEES AS SANCTIONS FOR MR. ABNOS' IMPROPER REMOVAL.

1. The Removal Statute Provides for Sanctions Even Without Bad Faith.

On granting a motion for remand, the Court may order Mr. Abnos to pay SCMV its "just costs and any actual expenses, *including attorney fees*, incurred as a result of the removal."[20] The statutory purpose of such an award is to deter the possibility of abuse, unnecessary expense and harassment if a party improperly removes an action.[21] It is not necessary to show that the removing party's position was "frivolous, unreasonable or without foundation."[22] Mr. Abnos does not dispute this.

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[19] Code of Civil procedure § 1292.6 [emphasis added]; *see also Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1796; *Byerly v. Sale* (1988) 204 Cal.App.3d 1312, 1315.

[20] 28 U.S.C. § 1447(c) [emphasis added]; *see Martin v. Franklin Capital Corp.* (2005) 546 U.S. 132, 135-136.

[21] *Circle Industries USA, Inc. v. Parke Const. Group, Inc.* (2nd Cir. 1999) 183 F.3d 105, 109.

[22] *Martin v. Franklin Capital Corp., supra*, 546 U.S. at 137.

Contrary to Mr. Abnos' arguments, SCMV did not include the procedural history of Mr. Abnos' foot-dragging and stalling to engage in a discussion of the substantive merits of the arbitrator's decision, or to reveal communications made at mediation—no such substantive communications were mentioned. Rather, SCMV's purpose was to demonstrate Mr. Abnos' conduct over the course of his state lawsuit and the arbitration, and to thereby demonstrate why sanctions are "just," and that Mr. Abnos' removal is exactly the type of "abuse," "unnecessary expense," and "harassment" 28 U.S.C. section 1447(c) is designed to deter. It shows that Mr. Abnos decision to remove was not objectively reasonable. At every turn, for almost two years, Mr. Abnos has unnecessarily increased SCMV's expenses and delayed the just resolution of the case. Under those circumstances, sanctions are appropriate and necessary to deter such conduct.

III. CONCLUSION

For the reasons stated above and in SCMV's Motion, the Court should decline Mr. Abnos' invitation to exercise jurisdiction it lacks, and remand the action to state court. Also, the Court should award SCMV the costs and fees it incurred as a result of Mr. Abnos' improper removal—a removal that in the context of the history of this case is anything but objectively reasonable.

Respectfully submitted,

Dated: April 18, 2008

SELTZER CAPLAN McMAHON VITEK
A Law Corporation

/S/ *Christopher L. Ludmer*
By:______________________________
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